Bank Kerjasama Rakyat Malaysia Bhd v Abdul Aziz bin Zainal & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC-357–06 OF 2018
MOHD ARIEF J
4 SEPTEMBER 2023

Companies and Corporations — Directors — Breach of duty — Fiduciary duty — Contractual duty — Duty of care — Statutory duty — Director of company approved application for sponsorship of book — Whether director and chairman of company acted in best interest of company — Whether honest and intelligent director would have approved application for sponsorship — Whether sponsorship was for benefit of company — Whether director breached fiduciary duty, contractual duty and duty of care — Whether director had caused company to breach s 41(4)(c) of the Development Financial Institution Act 2002

Contract — Restitution — Unjust enrichment — Sponsorship of books by company — Company made payment to publisher of books — Books not printed and distributed — Whether publisher of book and its director were unjustly enriched — Whether payment ought to be returned to company

Evidence — Adverse inference — Failure of plaintiff to call witness — Testimony of witness was recorded but plaintiff did not call witness during trial — Whether there was suppression of evidence — Whether testimony admissible — Whether adverse inference ought to be invoked — Evidence Act 1950 s 114(g)

Tort — Conspiracy — Conspiracy to defraud — Sponsorship of books by company — Company made payment to publisher of books — Books not printed and distributed — Whether publisher, director of publisher and stakeholder of monies were parties to conspiracy to defraud company — Whether actions by publisher, director of publisher and stakeholder of monies were intended to cause harm to company — Whether company entitled to exemplary and aggravated damages

The present action by Bank Kerjasama Rakyat Malaysia Bhd ('the plaintiff') against the defendants was in relation to a sponsorship of a book about the former Prime Minister of Malaysia, Datuk Seri Najib Razak ('the former Prime Minister') by the plaintiff. In this regard, the amount expended by the plaintiff for the sponsorship was RM15m for 25,000 copies of the book. The roles of each of the defendants in the present case were as followed: (a) the first

defendant was the former chairman of the plaintiff; (b) the second defendant was the former managing director of the plaintiff; (c) the third defendant was the publisher of the book; (d) the fourth defendant was a lawyer who acted as the stakeholder of the publisher; and (e) the fifth defendant was the director of the publisher. Based on the facts, the publisher of the book had approached the first defendant to apply for the sponsorship of the book. In this regard, the fifth defendant had furnished the first defendant with a letter from the then chief private secretary of the former Prime Minister endorsing the sponsorship. There was also a letter by the publisher to the first defendant with an alleged handwritten endorsement from the former Prime Minister stating 'Untuk Pertimbangan'. The first defendant then told the second defendant to consider the said application for sponsorship and this must be done discreetly and not to inform anyone. The second defendant then instructed his personal assistant known as Jojo to ask the Public Relations and Corporate Branding Department ('the said department') to prepare the necessary paperwork. The interviews by Ernst & Young showed that in giving such instruction, the second defendant had indicated to Jojo that the sponsorship application must be undertaken discreetly and not involve too many individuals. Nizam bin Sani, the senior vice president of the said department then prepared the relevant paperwork. Subsequently, the second defendant approved the sponsorship application, and the funds were then released to the fourth defendant as the stakeholder of the publisher. Predicated on these facts, the plaintiff sued the first and second defendants for breach of fiduciary duties and negligence, and/or breach of contractual obligations whilst the others were sued premised on fraud and unjust enrichment. The plaintiff also sued all the defendants for conspiracy to defraud. In relation to the plaintiff's breach of s 41(4)(c) of the Development Financial Institution Act 2002 ('the said Act'), the plaintiff argued that the defendants had caused the plaintiff to breach such provision, as such, the defendants should repay the plaintiff the sum penalised by Bank Negara Malaysia.

Held:

(1) It was trite that the first and second defendants had fiduciary, contractual and owed duties of care to the plaintiff as the chairman and managing director of the financial institution. It was also trite that as directors of the plaintiff, the said defendants owed a duty to act at all times in the best interest of the institution. It was therefore trite that the court must ascertain whether the said defendants had acted in the best interest of the plaintiff. This would be looked at objectively with reference 'to what an honest and intelligent man in the position of the directors would have done' based on the facts of this case (see paras 28–29 & 31).

(2) The court agreed with the first and second defendants that the powers to approve the sponsorship was within the discretion of the second defendant, but this fact did not absolve the defendants for failure to act in

the best interest of the plaintiff to exercise the said discretion appropriately and diligently. The second defendant had an obligation to ensure that any sponsorship programme to be endorsed on behalf of the plaintiff must be undertaken in accordance with the internal policies of the plaintiff and must be beneficial to the plaintiff. However, in the present case, the totality of the evidence indicated that the second defendant wanted to maintain a curtain of secrecy and wanted to ensure that the application was processed and approved to appease the request of the former Prime Minister. The second defendant failed to put his mind to the issue of whether the sponsorship of the book would benefit the plaintiff. In totality, the court found that the second defendant failed to act as a reasonable and competent managing director of the plaintiff and had acted merely to please third parties. Further, he had failed to exercise his powers appropriately and failed to exercise any diligence expected of him when dealing with the said sponsorship (see paras 34–35, 46, 53 & 55–56).

(3) Looking at the facts and evidence objectively, the court found that an honest and intelligent director would not have believed that the said sponsorship was for the benefit of the plaintiff. A reasonable and diligent director would have ensured that the sponsorship application be investigated further or at the very least bring the said issue up for consideration at the next board of directors meeting to be deliberated in detail before any decision was made. However, this was not done in this case. The failure to inform the board of directors indicated that the first and second defendants had failed to discharge their duties owed to the plaintiff. Their decision to keep the sponsorship secret and their failure to take steps to ensure that the sponsorship was in the best interest of the plaintiff were clear breached of their contractual and statutory duties to the plaintiff. Based on the above, the court found that the first and second defendants had failed to act in the best interest of the plaintiff and did breach their fiduciary duty, contractual duty, and duty of care to the plaintiff (see paras 64, 69–70, 75, 78, 81 & 88).

(4) The court was aware that the plaintiff did not call Jojo to give evidence in this case. The court would therefore put little weight on the statements taken from Jojo by Ernst & Young on its own. This did not mean that the said testimony was not admissible or should be subject to an adverse inference under s 114(g) of the Evidence Act 1950. The application of s 114(g) of the Evidence Act 1950 was not automatic. It must be shown that there had been any evidence of withholding or suppression of evidence and not merely on account of failure to call or obtain evidence. In the present case, the court did not find any evidence of any suppression of Jojo's evidence by the plaintiff and the court found that the defendants could have also subpoenaed Jojo if they wished to do so. This remained a civil claim and the burden of proof was based on the balance of

probabilities. The court found that the plaintiff had discharged their evidential and legal burden to support their claims against the defendants despite not calling Jojo (see paras 43–44 & 47).

(5) There was no evidence before the court that the books were printed or even purchased from the original publisher or even ordered from the said entity save for the unstamped agreement dated 28 March 2016. The court found that the third, fourth and fifth defendants were parties to a scheme to cause the plaintiff to agree to the sponsorship of the book that was never launched. Their conduct when considered did not reflect the actions of an honest person. The fourth defendant as the stakeholder of the project, at the very least must have closed her eyes and ears to the obvious wrong conduct of defrauding the plaintiff. She would have known what happened to the monies but refused to show the court where the said funds were paid to despite the waiver of privilege by the third defendant. Based on the evidence, the court found that the third, fourth and fifth defendants were parties to a conspiracy to defraud and their actions were intended to cause harm to the plaintiff, but the court did not find that the claim of conspiracy to defraud was proven against the first and second defendants (see paras 91–92 & 98–99).

(6) Due to the conduct of the third to fifth defendants, the court found this was a suitable case for the court to exercise its powers to impose exemplary and aggravated damages against them. Each of the said defendants were liable to the plaintiff jointly and/or severally for exemplary damages to the sum of RM1m. The court found that their conduct was calculated to defraud the plaintiff and all of them knew or at the very least, the fourth defendant had closed an eye to the wrongdoing that was apparent before her (see para 100).

(7) The court found that the third and fifth defendants had been unjustly enriched to the detriment of the plaintiff. The court did not find liability against the fourth defendant as she was only acting as the stakeholder for the third defendant and for the project. There was no evidence that the funds had flowed to her personal account, or she received any benefit from payments of the said funds. As per the court's earlier finding, there was no credible evidence that the books were printed and distributed, as such, the third and fifth defendants should be made liable and should be directed to return the said funds paid by the plaintiff (see paras 101–102).

(8) The penalty imposed by Bank Negara Malaysia under s 41(4)(c) of the said Act was caused by the failure of the plaintiff to have a sound risk management and governance procedures. The penalty did not arise solely from the book sponsorship programme but was targeted towards the failure of the plaintiff to have the expected internal governance procedures. This did not relate solely to the book sponsorship. The book sponsorship was merely a fruit of the underlying problem that was

penalised by Bank Negara Malaysia. Therefore, the court rejected the said claim by the plaintiff against the defendants (see paras 103–105).

(9) For the above reasons, the court made the following orders against the defendants: (a) the defendants were liable jointly and/or severally to the plaintiff for the sum of RM14,991,283.20 to be paid within 14 days from the date of the order of the court; (b) exemplary and aggravated damages against the third, fourth and fifth defendants to the sum of RM1m to the plaintiff jointly and severally; (c) costs of RM20,000 to be paid by each of the defendants to the plaintiff subject to allocator; and (d) interest on judgment debt at 5% per annum from date of judgment to date of realisation (see para 106).

[Bahasa Malaysia summary

Tindakan semasa oleh Bank Kerjasama Rakyat Malaysia Bhd ('plaintif') terhadap defendan-defendan adalah berhubung dengan penajaan buku mengenai bekas Perdana Menteri Malaysia, Datuk Seri Najib Razak ('bekas Perdana Menteri') oleh plaintif. Berhubung dengan ini, jumlah yang dibelanjakan oleh plaintif untuk tajaan tersebut ialah RM15 juta untuk 25,000 naskhah buku tersebut. Peranan setiap defendan dalam kes ini adalah seperti berikut: (a) defendan pertama ialah bekas pengerusi plaintif; (b) defendan kedua ialah bekas pengarah urusan plaintif; (c) defendan ketiga ialah penerbit buku tersebut; (d) defendan keempat ialah seorang peguam yang bertindak sebagai pemegang amanah penerbit tersebut; dan (e) defendan kelima ialah pengarah penerbit tersebut. Berdasarkan fakta, penerbit buku tersebut telah menghubungi defendan pertama untuk memohon tajaan buku tersebut. Dalam hal ini, defendan kelima telah memberikan kepada defendan pertama surat daripada ketua setiausaha sulit bekas Perdana Menteri ketika itu yang mengesahkan penajaan tersebut. Terdapat juga surat oleh penerbit kepada defendan pertama yang mempunyai pengesahan dalam bentuk tulisan tangan daripada bekas Perdana Menteri yang menyatakan 'Untuk Pertimbangan'. Defendan pertama kemudiannya memberitahu defendan kedua untuk mempertimbangkan permohonan tersebut untuk penajaan dan ini mesti dilakukan secara berhemah dan tidak memberitahu sesiapa. Defendan kedua kemudiannya mengarahkan pembantu peribadinya dikenali sebagai Jojo untuk meminta Jabatan Perhubungan Awam dan Penjenamaan Korporat ('jabatan tersebut') menyediakan kertas kerja yang diperlukan. Temu bual oleh Ernst & Young menunjukkan bahawa dalam memberi arahan sedemikian, defendan kedua telah menyatakan kepada Jojo bahawa permohonan penajaan tersebut mesti dibuat secara berhati-hati dan tidak melibatkan terlalu ramai individu. Nizam bin Sani, naib presiden kanan jabatan tersebut kemudiannya menyediakan kertas kerja yang berkaitan. Setelah itu, defendan kedua telah meluluskan permohonan penajaan tersebut, dan dana yang berkaitan kemudiannya diserahkan kepada defendan keempat sebagai pemegang amanah penerbit. Berdasarkan fakta ini, plaintif telah menyaman defendan

pertama dan kedua kerana melanggar kewajipan fidusiari dan kecuaian, dan/atau melanggar kewajipan kontrak manakala yang lain disaman berdasarkan fraud dan pengayaan yang tidak adil. Plaintif juga menyaman semua defendan kerana melakukan konspirasi untuk menipu. Berhubung dengan pelanggaran plaintif terhadap s 41(4)(c) Akta Institusi Kewangan Pembangunan 2002 ('Akta tersebut'), plaintif berhujah bahawa defendan-defendan telah menyebabkan plaintif melanggar peruntukan tersebut, oleh itu, defendan-defendan hendaklah membayar semula kepada plaintif jumlah penalti yang dikenakan oleh Bank Negara Malaysia.

Diputuskan:

(1) Sudah menjadi undang-undang yang mantap bahawa defendan pertama dan kedua sebagai pengerusi dan pengarah urusan institusi kewangan mempunyai tanggungjawab fidusiari, tanggungjawab kontrak dan kewajipan berjaga-jaga kepada plaintif. Ia juga merupakan sesuatu yang sudah diterima bahawa sebagai pengarah-pengarah plaintif, defendan-defendan tersebut mempunyai kewajipan untuk bertindak pada setiap masa demi kepentingan terbaik institusi tersebut. Oleh itu, adalah wajar bahawa mahkamah mesti memastikan sama ada defendan-defendan tersebut telah bertindak demi kepentingan plaintif. Ini akan dilihat secara objektif dengan merujuk 'apa yang akan dilakukan oleh seorang lelaki yang jujur dan bijak dalam kedudukan pengarah' berdasarkan fakta kes ini (lihat perenggan 28–29 & 31).

(2) Mahkamah bersetuju dengan defendan pertama dan kedua bahawa kuasa untuk meluluskan penajaan tersebut adalah mengikut budi bicara defendan kedua, tetapi fakta ini tidak melepaskan defendan-defendan di atas kegagalan bertindak demi kepentingan plaintif untuk melaksanakan budi bicara dengan sewajarnya dan bersungguh-sungguh. Defendan kedua mempunyai kewajipan untuk memastikan bahawa apa-apa program penajaan yang akan diendors bagi pihak plaintif mesti dijalankan mengikut dasar dalaman plaintif dan mesti bermanfaat kepada plaintif. Bagaimanapun, dalam kes ini, keseluruhan keterangan menunjukkan bahawa defendan kedua mahu mengekalkan tirai kerahsiaan dan mahu memastikan permohonan tersebut diproses dan diluluskan untuk memenuhi permintaan bekas Perdana Menteri. Defendan kedua gagal meletakkan fikirannya kepada isu sama ada penajaan buku tersebut akan memberi manfaat kepada plaintif. Secara keseluruhannya, mahkamah mendapati defendan kedua gagal bertindak sebagai pengarah urusan plaintif yang munasabah dan cekap dan telah bertindak semata-mata untuk menggembirakan pihak ketiga. Tambahan pula, dia telah gagal menggunakan kuasanya dengan sewajarnya dan gagal melaksanakan apa-apa ketekunan yang diharapkan daripadanya semasa menguruskan penajaan tersebut (lihat perenggan 34–35, 46, 53 & 55–56).

(3) Melihat kepada fakta dan keterangan secara objektif, mahkamah mendapati pengarah yang jujur dan bijak tidak akan percaya bahawa penajaan tersebut adalah untuk manfaat plaintif. Pengarah yang munasabah dan tekun akan memastikan permohonan penajaan tersebut disiasat lebih lanjut atau sekurang-kurangnya membawa isu tersebut untuk dipertimbangkan pada mesyuarat Lembaga Pengarah seterusnya untuk dibincangkan secara terperinci sebelum apa-apa keputusan dibuat. Walau bagaimanapun, ini tidak dilakukan dalam kes ini. Kegagalan untuk memaklumkan kepada Lembaga Pengarah menunjukkan bahawa defendan pertama dan kedua telah gagal menunaikan kewajipan mereka terhadap plaintif. Keputusan mereka untuk merahsiakan penajaan tersebut dan kegagalan mereka mengambil langkah untuk memastikan bahawa penajaan tersebut adalah demi kepentingan plaintif jelas melanggar kewajipan kontrak dan statutori mereka kepada plaintif. Berdasarkan perkara di atas, mahkamah mendapati bahawa defendan pertama dan kedua telah gagal untuk bertindak demi kepentingan terbaik plaintif dan telah melanggar kewajipan fidusiari, kewajipan kontrak dan kewajipan berjaga-jaga kepada plaintif (lihat perenggan 64, 69–70, 75, 78, 81 & 88).

(4) Mahkamah sedar bahawa plaintif tidak memanggil Jojo untuk memberi keterangan dalam kes ini. Oleh itu mahkamah akan memberi kurang pemberatan pada kenyataan yang diambil daripada Jojo oleh Ernst & Young sendiri. Ini tidak bermakna bahawa keterangan tersebut tidak boleh diterima atau harus tertakluk kepada inferens bertentangan di bawah s 114(g) Akta Keterangan 1950. Pemakaian s 114(g) Akta Keterangan 1950 adalah tidak automatik. Ia mesti ditunjukkan bahawa terdapat apa-apa bukti penahanan atau penindasan keterangan dan bukan semata-mata kerana kegagalan untuk memanggil atau mendapatkan keterangan. Dalam kes ini, mahkamah tidak menemui apa-apa bukti mengenai apa-apa penindasan keterangan Jojo oleh plaintif dan mahkamah mendapati defendan-defendan juga boleh menyepina Jojo jika mereka mahu berbuat demikian. Ini kekal sebagai tuntutan sivil dan beban pembuktian adalah berdasarkan imbangan kebarangkalian. Mahkamah mendapati bahawa plaintif telah melepaskan beban keterangan dan undang-undang mereka untuk menyokong tuntutan mereka terhadap defendan-defendan walaupun tidak memanggil Jojo (lihat perenggan 43–44 & 47).

(5) Tiada keterangan di hadapan mahkamah bahawa buku-buku tersebut telah dicetak atau dibeli daripada penerbit asal atau pun dipesan daripada entiti tersebut kecuali perjanjian yang tidak disetem bertarikh 28 Mac 2016. Mahkamah mendapati defendan ketiga, keempat dan kelima adalah pihak kepada skim untuk menyebabkan plaintif bersetuju dengan penajaan buku yang tidak pernah dilancarkan. Kelakuan mereka apabila dipertimbangkan tidak mencerminkan tindakan seorang yang jujur.

Defendan keempat sebagai pemegang amanah projek tersebut, sekurang-kurangnya pasti telah menutup mata dan telinganya terhadap perlakuan salah yang nyata dalam menipu plaintif. Dia pasti tahu apa yang berlaku kepada wang tersebut tetapi enggan menunjukkan kepada mahkamah ke mana dana tersebut dibayar walaupun terdapat penepian keistimewaan oleh defendan ketiga. Berdasarkan keterangan, mahkamah mendapati defendan ketiga, keempat dan kelima adalah pihak-pihak yang terlibat dalam konspirasi untuk menipu dan tindakan mereka bertujuan untuk mendatangkan kemudaratan kepada plaintif, namun mahkamah tidak mendapati bahawa dakwaan konspirasi untuk menipu dibuktikan terhadap defendan pertama dan kedua (lihat perenggan 91–92 & 98–99).

(6) Disebabkan oleh kelakuan defendan ketiga hingga kelima tersebut, mahkamah mendapati ini adalah kes yang sesuai untuk mahkamah menjalankan kuasanya untuk mengenakan ganti rugi teladan dan teruk terhadap mereka. Setiap defendan tersebut bertanggungjawab kepada plaintif secara bersesama dan/atau berasingan untuk ganti rugi teladan berjumlah RM1 juta. Mahkamah mendapati bahawa kelakuan mereka dikira untuk menipu plaintif dan kesemua mereka tahu atau sekurang-kurangnya, defendan keempat telah menutup mata terhadap salah laku yang nyata di hadapannya (lihat perenggan 100).

(7) Mahkamah mendapati defendan ketiga dan kelima telah diperkaya secara tidak adil sehingga merugikan plaintif. Mahkamah tidak mendapati liabiliti terhadap defendan keempat kerana dia hanya bertindak sebagai pemegang amanah untuk defendan ketiga dan untuk projek tersebut. Tiada bukti bahawa dana telah mengalir ke akaun peribadinya, atau dia menerima apa-apa manfaat daripada pembayaran dana tersebut. Seperti yang mahkamah putuskan pada awalnya, tiada keterangan yang boleh dipercayai bahawa buku-buku tersebut dicetak dan diedarkan, oleh itu, defendan ketiga dan kelima harus dipertanggungjawabkan dan harus diarahkan untuk memulangkan dana tersebut yang telah dibayar oleh plaintif (lihat perenggan 101–102).

(8) Penalti yang dikenakan oleh Bank Negara Malaysia di bawah s 41(4)(c) Akta tersebut adalah disebabkan oleh kegagalan plaintif untuk menyediakan prosedur pengurusan risiko dan tadbir urus yang kukuh. Penalti tersebut tidak timbul semata-mata daripada program penajaan buku tersebut tetapi disasarkan kepada kegagalan plaintif untuk menyediakan prosedur tadbir urus dalaman yang diharapkan. Ini tidak berkaitan dengan penajaan buku semata-mata. Penajaan buku tersebut hanyalah hasil daripada masalah asas yang telah dihukum oleh Bank Negara Malaysia. Oleh itu, mahkamah menolak tuntutan plaintif tersebut terhadap defendan (lihat perenggan 103–105).

(9) Atas alasan-alasan di atas, mahkamah membuat perintah-perintah

berikut terhadap defendan-defendan: (a) defendan-defendan bertanggungjawab secara bersesama dan/atau berasingan kepada plaintif untuk jumlah RM14,991,283.20 yang perlu dibayar dalam tempoh 14 hari dari tarikh perintah mahkamah; (b) ganti rugi teladan dan teruk terhadap defendan ketiga, keempat dan kelima pada jumlah RM1 juta kepada plaintif secara bersesama dan berasingan; (c) kos sebanyak RM20,000 yang perlu dibayar oleh setiap defendan kepada plaintif tertakluk kepada alokator; dan (d) faedah ke atas hutang penghakiman pada kadar 5% setahun dari tarikh penghakiman hingga tarikh penyelesaian (lihat perenggan 106).]

Cases referred to

Acumen Scientific Sdn Bhd v Yeow Liang Ming [2020] 3 MLJ 82; [2021] 2 CLJ 369, CA (refd)

Bristol and West Building Society v Mothew [1998] Ch 1, CA (refd)

Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal [2016] 3 MLJ 797, CA (refd)

Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor [2013] 7 MLJ 437, HC (refd)

Maheswari a/p Eliathamby & Anor v Koperasi Serbaguna Kebangsaan Bhd & Ors [2019] 1 MLJ 440, CA (refd)

Munusamy v PP [1987] 1 MLJ 492; [1987] 1 CLJ 250, SC (refd)

Ng Pak Cheong v Global Insurance Co Sdn Bhd [1995] 1 MLJ 64; [1995] 1 CLJ 223, HC (refd)

Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals [2012] 3 MLJ 616, CA (refd)

Royal Brunei Airlines Sdn Bhd v Tan Kok Ming Philip [1995] 3 MLJ 74; [1996] 2 CLJ 380 (refd)

Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784, CA (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)

Tekital Sdn Bhd v Sarina bt Kamaludin & Ors [2012] 8 MLJ 734, HC (refd)

Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal [2018] 2 MLJ 177; [2018] 2 CLJ 641, FC (refd)

Tiga Gajah Cho Heng Sdn Bhd v Majuperak Tepung Beras Sdn Bhd [1997] 4 MLJ 504, HC (refd)

Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors [2019] 1 MLJ 421, CA (refd)

Legislation referred to

Co-operative Societies Act 1993
Development Financial Institutions Act 2002 ss 5A, 41(4)(c)
Evidence Act 1950 s 114(g)

Shahrul Hameed Amiruddin (with Sharanya Visualingam and Aida Liyana Zainal Rashid) (Zulrafique & Partners) for the plaintiff.
Nurul Huda Razali (Haniff Katri) for the first and second defendants.
Fadilah Ahmad (Amelda Fuad Abi & Adil) for the third and fifth defendants.
Wan Roslan bin Wan Ismail (Roslan, Hazratul, Azman & Hisyam) for the fourth defendant.

Mohd Arief J:

INTRODUCTION

[1] The plaintiff instituted proceedings against the first to fifth defendants for the following:

Specifically, against the first and second defendants:

(a) failure to carry out their duties as the former chairman and managing director of the plaintiff;

(b) failure of the said defendants as the former chairman and managing director of the plaintiff to administer the affairs and business of the plaintiff in good faith, with integrity and competence and/or in the best interest of the plaintiff;

(c) failure by the said defendants as the managing director and chairman of the plaintiff to ensure that the board of directors are kept abreast of all relevant information concerning the financial affairs of the plaintiff, especially concerning the purported book sponsorship amounting to RM15m at issue;

(d) failure to act in accordance with their contractual duties and/or obligations to the plaintiff as the chairman and managing director;

(e) the defendants had acted in breach of their fiduciary duties to the plaintiff;

(f) the said defendants had failed to act in the best interest of the plaintiff by failing to ensure that the internal processes of the plaintiff are complied with concerning the book sponsorship programme;

(g) the defendants had acted in breach of their duties of care to the plaintiff pertaining to the sponsorship programme amounting to RM15m;

(h) the defendants had acted in breach of trust;

(i) the defendants had failed to ensure that the board of directors had been informed as to the said book sponsorship approval and the payment of the said sums to the alleged publisher;

(j) the defendants did cause the plaintiff to breach of s 41(4)(c) of the Development Financial Institution Act 2002 and as a result should repay the plaintiff the sum penalised by Bank Negara Malaysia.

Collectively against all defendants:

(g) conspiracy to defraud or cause damage to the plaintiff by approving the book sponsorship and to cause the release of the said sums of monies;

(h) conspiracy to defraud or cause damage to the plaintiff by manipulating the internal process of the plaintiff.

Fraud and unjust enrichment against the third to fifth defendants:

(i) that the third to fifth defendants should be liable to repay the sums paid as the book has not been published and that there was wrongdoing by the first and second defendants in approving and releasing the said sums to the third to fifth defendants;

(j) the plaintiff's claim could therefore be summarised into the following categories:

(i) breach of fiduciary duties against first and second defendants as managing director and chairman;

(ii) conspiracy to defraud and to cause damage against all defendants;

(iii) fraud and unjust enrichment against the third to fifth defendants; and

(iv) negligence and, or breach of contractual obligations by the first and second defendants.

BACKGROUND

Litigants

[2] The plaintiff is a co-operative and a financial institution. It is regulated under the Development Financial Institutions Act 2002 as well as under the Co-operative Societies Act 1993.

[3] The first defendant was the chairman of the plaintiff. He had a prolific career within the Armed Forces and was the Commander of the Armed Forces until his retirement. Subsequently he was made the Malaysian Ambassador to France and subsequently as the chairman of the plaintiff.

[4] The second defendant was the managing director of the plaintiff having risen from the rank and file of the said financial institution. He was first recruited as a Junior Executive of the plaintiff in 1991. The plaintiff is also an accountant trained from an established Australian University.

[5] The third defendant is a company and was the purported publisher of the book entitled 'Antara 2 Zaman Najib Tun Razak — Mendepani Cabaran dan Menggalas Sejuta Harapan'.

[6] The fourth defendant is an Advocate and Solicitor and acted as a stakeholder on behalf of the third defendant regarding the purported sponsorship of the above-mentioned book.

[7] The fifth defendant is a director of the third defendant.

Material facts

[8] The second defendant was approached by the fourth defendant, as director of the third defendant to sponsor the publication of the book entitled 'Antara 2 Zaman Najib Tun Razak — Mendepani Cabaran dan Menggalas Sejuta Harapan'.

[9] An impromptu meeting was held at the office of the first defendant at the plaintiff's premises on 12 February 2016. In the memorandum and interview record undertaken by Ernst & Young dated 30 September 2016, which was approved by the first defendant as being correct, the first defendant stated that he had received a request through his secretary to attend a meeting with the fifth defendant concerning a proposed plan to sponsor the above referred book ('first meeting').

[10] The first defendant agreed to the said request despite not having any

previous contact with the said fifth defendant or without any notice either from Prime Minister's office or his political secretary or even the then Prime Minister's personal secretary as to the said proposal to sponsor the said book.

[11] According to the first defendant, based on the notes taken by Ernst & Young, the purpose of the said book was to 'enhance (the then Prime Minister's) image given that at that time, his political situation was not that good' and that this book was to be published before the Sarawak State Election.

[12] The first defendant did inquire why the said sponsorship had to be undertaken through the plaintiff. The fifth defendant informed the first defendant that the then Prime Minister believed that the first defendant was the 'only person that can do this for him and the only person that won't betray him'.

[13] During the first meeting, the fifth defendant had also furnished a letter dated 2 February 2016 issued by Tan Sri Hj Shukry bin Mohd Salleh, then Chief Private Secretary to the Prime Minister, endorsing the sponsorship. A copy of the letter issued by the fifth defendant on the letter head of the third defendant dated 22 January 2016 to the first defendant, as chairman of the plaintiff, was also furnished. In the said letter, contained an alleged handwritten endorsement from the then Prime Minister stating 'Untuk Pertimbangan'.

[14] A mock copy of the book was shown to the first defendant by the fifth defendant. The first defendant then called the second defendant, then managing director to the plaintiff, to join the meeting.

[15] Upon being summoned by the first defendant, the second defendant attended the first meeting with the fifth defendant. He was informed by the first defendant that the then Prime Minister wanted the aforementioned book to be published. The fifth defendant had also informed the first and second defendants that the sponsorship amount would be to the sum of RM15m. The second defendant did inform that the plaintiff sponsor to the sum of RM 500k to RM1m but upon the insistence by the first defendant that the Prime Minister wanted the said amount of RM15m for sponsorship of 25,000 books, the second defendant stated that he will 'look into it'.

[16] I also note that the first defendant did suggest some changes to the contents of the said book to include additional features concerning Tun Abdul Razak. Additions were made and a second meeting was held between the first defendant and the fifth defendant on 18 February 2016.

[17] A third meeting was subsequently held in March 2016 with the

addition of the fourth defendant. The fourth defendant was introduced to the first defendant to act as the stakeholder for the third defendant in the said transaction. The first defendant then directed that the third to fifth defendants deal directly with the second defendant as he was the managing director of the plaintiff concerning the sponsorship proposal.

[18] A copy of the letter dated 2 February 2016 issued by the Prime Minister's office to the first defendant and the two letters dated 6 March 2016 and 3 March 20167 (from the third and the fourth defendants), seeking sponsorship of 2,500 copies of the book, was subsequently given by the first defendant to the second defendant. The contents of the letter dated 6 March 2016 from the third defendant is almost similar to the letter dated 22 January 2016.

[19] According to the notes recorded by Ernst & Young and acknowledged by the second defendant, it was stated that the first defendant had told the second defendant to consider the application and that the Prime Minister had personally requested for the sponsorship of the said book. The first defendant also stated that this must be done discreetly and not to inform anyone as the Prime Minister has enough problems at the said time.

[20] The second defendant then gave a copy of the letters on 10 March 2016 concerning the application for sponsorship to his personal assistant, Dzul Hashiddin bin Baharidin ('Jojo'). Jojo was instructed by the second defendant to the Public Relations and Corporate Branding Department to prepare the necessary paperwork for the application by the third defendant.

[21] Although disputed by the second and third defendants, the records made of the interviews by Ernst & Young, indicate that the second defendant did indicate to the Jojo that this sponsorship application must be undertaken discretely and not to involve too many individuals within the organisation. The following words were noted by Ernst & Young in the record of the interview of Jojo:

> Datuk MD reminded me that 'benda nijangan kecoh-kecoh sebab benda ni melibatkan Perdana Menteri dan pada masa itu tidak stabil.
>
> Datuk MD also mentioned that 'Tan Sri juga cakap jangan kecoh-kecoh sebab ini melibatkan Perdana Menteri dan pada masa itu tidak stabil'.

This also appears in the notes of the interview with the second defendant by Ernst & Young:

> During this meeting, Tan Sri Chairman has requested me 'to do it discretely': 'don't inform anyone' and 'explained that PM got so many problems'.

[22] On the same day, 10 March 2016, Jojo approached one Nizam bin Sani, the Senior Vice President of the aforesaid department. Jojo then informed Nizam bin Sani of the following:

> this needs to be done fast, needs to be quick, and not to get many people involved. It has to be processed.

Nizam bin Sani was also told to prepare the paperwork manually and not undertake the same through the e-documentation system implemented within the first plaintiff. Nizam was told to prepare the necessary documents manually to be considered by the second defendant.

[23] Nizam bin Sani, as instructed by Jojo, prepared the paperwork required for the said sponsorship. A physical copy of the memorandum to consider the sponsorship of the book was prepared and sent to the second defendant for approval. This was done on the same day on 10 March 2016. The second defendant approved the said memorandum on 11 March 2016, and a copy was uploaded onto the plaintiff's e-documentation system despite the previous direction by Jojo. The second defendant then subsequently granted his approval within the e-documentation system on 11 March 2016.

[24] The third defendant issued its invoice dated 7 March 2016 which was then forwarded to the first defendant. The first defendant upon receipt of the said invoice then forwarded the same to the second defendant on 16 March 2016. The said invoice was then processed within the plaintiff's internally and the funds were then released to the fourth defendant as a stakeholder for the third defendant.

[25] Despite receiving the payment of RM15m, there is no credible evidence before me that the said book has been printed. There is also no evidence that the said book has been distributed to any school or any party. The said book was also not launched by the then Prime Minister despite repeated assurances by the third and fifth defendants.

TRIAL

[26] The following individuals gave evidence before this court:

(a) plaintiff's witnesses:

(i) Nizam bin Abu Samah;

(ii) Liza Ros bin Damsi;

(iii) Nizam bin Sani;

(iv) Shakura Anwar bin Mohamad Tahir; and

(v) Joyce Lim Wan Cheak.

(b) all of the defendants gave evidence.

DECISION OF THIS COURT

[27] After considering the documents, the testimony of the witnesses called by the litigants and the submissions by learned counsels, I find that the plaintiff has proven its case against the defendants on the balance of probabilities. My detailed reasons are contained in the following paragraphs.

DETAILED REASONS FOR LIABILITY AGAINST THE DEFENDANTS

Liability of the first and second defendants

[28] It is trite that the first and second defendants have fiduciary, contractual and owed duties of care to the plaintiff as the chairman and managing directors of the financial institution.

[29] It is also trite that as directors of the plaintiff, the said defendants owed a duty to act at all times in the best interest of the institution. I refer to the decision of the Federal Court in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177; [2018] 2 CLJ 641 where Azahar Mohamad FCJ (as he then was) held:

> [172] One of the important principles of law that can be distilled from the case of *Charterbridge Corporation Ltd v Lloyds Bank Ltd* was that the test for breach of duty of a director and acting in 'the interest of the company' has an objective element: whether an honest and intelligent man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company.
>
> [173] This principle has come to be known as the 'Charterbridge principle' (per Zainun Ali JCA (as Her Ladyship then was) in *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor*). As correctly stated by Pearlie MC Koh on *Company Law*, at p 112, it is an objective element in the test in the sense that this was done by reference to what an honest and intelligent man in the position of the directors would have done. Elsewhere at p 301, the learned writer stated that 'the tension between commercial reality and the requirements of the law is alleviated somewhat by the adoption of an objective formulation of the test for breach of directors' duty'.
>
> [174] *The Singapore Court of Appeal in the case of lntraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR (R) 1064 accepted Pennycuick J's formulation in *Charterbridge Corporation Ltd v Lloyds Bank Ltd*. The Singapore Court of Appeal in applying the objective element in the test had this to say:
>
> > Counsel for the appellants relied on this dicta and submitted that the circumstances here were not such as to lead to an inference of dishonesty on the part of the directors of the respondents, but were such that a reasonable man

could have inferred that the transactions were entered into bona fide by the directors in the interests of the respondents. He contended that as the directors of the respondents were also the directors of City Carton, they had considered the group as an economic entity and therefore acted for the benefit of the group as a whole. At the same time, he submitted that the directors would have reasonably regarded the equity participation of the appellants as beneficial to the respondents. We accepted this submission. We were of the opinion that an honest and intelligent man in the position of the directors, taking an objective view, could reasonably have concluded that the transactions were in the interests of the respondents. There was clearly no evidence that the directors of the respondents had acted in breach of their duties to the respondents.

[175] In *Spedley Securities Ltd (in liq) v Greater Pacific Investments Pty Ltd (in liq)* [1992] 7 ACSR 155, a 'round robin' of transactions was effected by Mr Yuill (a director of Spedley Securities Ltd (in liq) (Spedley)) and others, essentially with the purpose of 'cleaning up' the balance sheet of Spedley. An action was brought to determine the validity of the various transactions. Cole J applied the objective element in the test as follows:

> The test to be applied in considering the actions of Mr Yuill in effectively denuding GPIL of substantial assets by transferring them to GPI and P152 so that the funds could be returned ultimately to SSL and thus improve its balance sheet is that enunciated in *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62 at 74: s an intelligent and honest man in the position of a director of GPIL, do I, in the whole of the existing circumstances, reasonably believe that the transactions are for the benefit of GPIL.

[176] A principal error of the Court of Appeal in the present case was its failure to consider *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor*, which applied the objective element in the test. In delivering the judgment of the Court of Appeal, this was what Zainun Ali JCA (as Her Ladyship then was) said:

> The prior provision of s 132(1) requires a director to act honestly. The current s 132(1) of the Act, requires a director to act in good faith in the best interest of the company. It is accepted that for all intents and purposes, the scope of the directors' duties to act honestly under the old s 132(1) and the new s 132(1) are the same. Thus the old case laws relating to the duty to act honestly continue to be relevant.

[177] Her Ladyship further said:

> The test is nicely condensed in *Ford's Principles of Corporations Law* (para 8.060), that there will be a breach of duty if the act or decision is shown to be one which no reasonable board could consider to be within the interest of the company. This test is adopted in *Charterbridge Corpn Ltd v Lloyds Bank Ltd* [1970] Ch 62 at p 74, in that, to challenge a decision of the directors, the test is whether: ... an intelligent and honest man in the position of the director of the company concerned, could in the whole of the existing circumstances have reasonably believed that the transactions were for the benefit of the company. The above principle is often referred to as the 'Charterbridge Principle'.

[178] In our judgment, the above passage from the judgment of *Pioneer Haven Sdn*

Bhd v Ho Hup Construction Co Bhd & Anor and other appeals states correctly the objective element in the test of whether a director acted in the 'best interest of the company'. It is against this benchmark that one must assess the decision of the defendants in the present appeals in the divestments of a substantial portion of the plaintiff's shareholding in PEB.

[30] I also refer to *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616, *Bristol and West Building Society v Mothew* [1998] Ch 1, *Ng Pak Cheong v Global Insurance Co Sdn Bhd* [1995] 1 MLJ 64; [1995] 1 CLJ 223 and *Acumen Scientific Sdn Bhd v Yeow Liang Ming* [2020] 3 MLJ 82; [2021] 2 CLJ 369.

[31] It is therefore trite that this court must ascertain whether the said defendants had acted in the best interest of the plaintiff. This will be looked at objectively with reference 'to what an honest and intelligent man in the position of the directors would have done' based on the facts of this case.

[32] The duty imposed on the said defendants also appear in the Board Charter of the plaintiff which the said defendants are subject to:

4. Chairman

4.1 The Chairman is responsible for:

4.1.1 the leadership and management of the Board and ensuring that the Board and the Board Committee function effectively.

4.1.3 ensuring that the directors receive accurate, timely and clear information to enable them to discharge their duties. The directors are entitled to request for additional information where they consider such information necessary to make informed decisions.

4.1.4 ensuring that the views, guidelines, circulars and directives of Bank Negara Malaysia, the MOF and the Minister are communicated to and adhered to by the Board.

5. Managing Director

5.1.1 the development, in conjunction with the Board, and implementation of short, medium and long-term corporate strategies for the Bank, preparing business plans and reports with senior management and reporting presenting to the Board on current and future initiatives.

5.1.2 ensuring that the policies and decisions approved by the Board are carried out by management to their desired outcomes.

5.1.3 ensuring the efficient and effective day-to-day operations of the Bank.

5.1.4 ensuring that the Bank has the appropriate risk management policies in place.

...

5.1.7 bringing material and other relevant matters to the attention of the Board in an accurate and timely manner.

...

10. Code of Conduct

10.1 Board Members must observe the highest standards of ethical behaviour. All directors shall be guided and shall observe the code of ethics and conduct from time to time issued by Bank Negara Malaysia and the Companies Commission of Malaysia.

10.2 A director must act honestly, in good faith and use care and diligence in fulfilling the functions of office and exercising the powers attached to that office for a proper purpose, in the interests of the Bank as a whole.

10.3 A director must recognise that the primary responsibility is to the Bank's cooperative members and stakeholders having regard to the requirements of Bank Negara Malaysia, the MOF and the Minister.

...

10.6 A director must not allow personal interests or the interest of any associated person to conflict with the interests of the Bank.

10.7 A director must be independent in judgment and actions and to take all reasonable steps to be satisfied as to the soundness of all decisions taken by the Board.

[33] I also refer to s 5A of the Development Financial Institutions Act 2002, which the plaintiff is subject to:

5A(1) A director of a prescribed institution shall at all times —

(a) act in good faith in the best interests of the prescribed institution;

(b) exercise reasonable care, skill and diligence with —

(i) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and

(ii) any additional knowledge, skill and experience which the director has;

(c) only exercise powers conferred on him for the purposes for which such powers are conferred;

(d) exercise sound and independent judgment; and (e) comply with any standards specified by the Bank which are applicable to a director.

(2) Subsection (1) has effect in addition to, and not in derogation of, any written law or rule of law relating to the duty or liability of a director.

(3) Any director who contravenes paragraph (1)(c) commits an offence and shall on conviction be liable to imprisonment for a term not exceeding eight years or to a fine not exceeding twenty-five million ringgit or to both.

[34] I agree with the first and second defendants' counsel that the powers to approve the sponsorship lies with the second defendant. This is stated in the plaintiff's own internal memorandum dated 3 November 2014 entitled 'Penajaan' which states that the power to consider and approve any sponsorship above the sum of RM50,000 shall reside with the managing director of the plaintiff, the second defendant.

[35] This fact does not however mean that the second defendant is free from blame. The fact that the power lies with the second defendant would mean that it is his obligation to ensure that any sponsorship programme to be endorsed on behalf of the plaintiff must be undertaken in accordance with the internal policies of the plaintiff and must be beneficial to the plaintiff. The decision to either agree or reject any sponsorship application must be undertaken solely by him and he must 'act honestly, in good faith and use care and diligence in fulfilling the functions of office and exercising the powers attached to that office for a proper purpose.

[36] The said decision will also be subject to scrutiny by this court. It must withstand the test laid down as referred to earlier. It must be shown 'whether an honest and intelligent man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company'.

[37] In other words, based on the circumstances at the material time, the information available to the second defendant and all relevant factors available to him, was his decision to grant or approve the RM15m sponsorship of the book reasonable? Would an honest and intelligent director believe that the said sponsorship was for the benefit of the plaintiff?

The second defendant's failure to exercise discretion appropriately and acted blindly to appease third parties

[38] Having considered the totality of evidence before me, I find that the second defendant had failed to exercise his duty to even scrutinise the sponsorship the book. There is a clear failure on the part of the second defendant as the managing director of the plaintiff failed to even exercise any form of independent scrutiny on the proposal presented by the third defendant even with the alleged blessing of the then Prime Minister or from the Prime Minister's office.

[39] In the second defendant's testimony, he stated that he had considered the proposal based on the paper prepared by Nizam bin Sani. He believed that the sponsorship programme will be beneficial to the plaintiff. He said that the said sponsorship of the book will contribute to the plaintiff's corporate social

responsibility programme where the book will be donated to schools and public institutions of learning. He also alleges that he had considered that the book will enhance the understanding of the legacy left by Tun Abdul Razak and the legacy of the then Prime Minister Najib Tun Razak. He further added that this is inline with the plaintiff's own history. He also stated that he believed that this sponsorship is in line with 'Akta Bank Kerjasama Rakyat Malaysia Berhad (Peruntukan Khas) 1978 (Akta 202)' as it was the Minister of Finance that suggested the said sponsorship. He stated that he believed that the creation of a stable government will assist with the development of the plaintiff and that the sponsorship is therefore beneficial.

[40] I have considered his testimony and the evidence presented by him during cross-examination. I do not accept these parts of his testimony and find that these are mere afterthoughts by him to justify his actions in blindly approving the said proposal for sponsorship. I believe he did not address his mind as to the reasoning and the benefit that the said sponsorship will provide to the plaintiff but was solely motivated by his willingness to appease the then Prime Minister's notation.

[41] I find that the testimony of Nizam bin Sani also brings credence to the fact that the second defendant did not address his mind as to whether the said sponsorship was beneficial to the plaintiff. In find that the second defendant had instructed Jojo to bring the issue of the sponsorship to the attention of the appropriate department and wanted to ensure that the matter is undertaken in secret. This is inline with the discussion between the first and second defendants that I have highlighted earlier where it was stated in the notes kept by Ernst & Young:

> During this meeting, Tan Sri Chairman has requested me 'to do it discretely', 'don't inform anyone' and 'explained that PM got so many problems'.

It is important to note that this note was approved by the second defendant himself.

[42] This tale of secrecy pervades through every part of the approval process and can be seen in the notes kept by Ernst & Young of the interviews undertaken with the relevant persons. These notes were also confirmed by each of the person interviewed by the said audit firm, and I do not find any credible reason or any credible evidence not to accept that these are correct. I reproduce relevant parts of each interview recorded by Ernst & Young:

(a) the second defendant:

> During this meeting, Tan Sri Chairman has requested me 'to do it discretely': 'don't inform anyone' and 'explained that PM got so many problems'.
>
> All the letters are attention to Tan Sri Chairman. I have believe and trust from

Tan Sri Chairman. Tan Sri Chairman makes me believe that the sponsorship is from PM and PM really wanted the Bank to sponsor this activity.

If you bring a crook to the Bank then crook will happen.

(b) Nizam bin Sani:

Dzul handed me the letters (ie Zilerie letter dated 6–3–2016 and Alira & Co's letter dated 3–3–2016) and asked me to process the payment quickly. Dzul also mentioned that this sponsorship should not involve many personnel ... Dzul also told me that the value of the sponsorship is MYR15 million, which I have told him that I don't have such money. I also told him that I have no idea where the budget will come from.

Dzul said he will figure it out and asked me to just put it as marketing and communications budget.

I was told that 'this needs to be done fast, needs to be quick, and not to get many people involved. It has to be processed'.

When Dzul passed me the documents, he asked me to process the sponsorship manually, where I do not need to raise an eDocument but just prepare a memorandum for Datuk MD to sign. He told me that 'the top did not want people to be involved in this.

(c) Dzul Hashiddin bin Baharidin ('Jojo'):

On 10–3–2016 morning, Datuk MD passed me two (2) documents ie the sponsorship letter from Zilerie dated 22–1–2016 'yang mana Perdana Menteri tulis untuk pertimbangan tu' and letter from PMO dated 2–2–2016 where 'Tan Sri tulis untuk pertimbangan' and 'di sokong'.

Datuk MD asked me to pass the documents to PR to 'buat kertas kerja'.

When Datuk MD passed me the documents, Datuk MD reminded me that 'benda ni jangan di kecoh-kecoh sebab benda ini melibatkan Perdana Menteri dan pada masa itu, tidak stabil'.

On the same day, I passed the documents to Nizam Sani 'to do the necessary' and I gave Nizam Sani the same instruction from Datuk MD ie 'apa Datuk cakap dengan I, I pun cakap dengan dia.

Datuk MD also mentioned that 'Tan Sri cakap jangan kecoh-kecoh sebab benda ni melibatkan Perdana Menteri dan pada masa itu, tak stabil'.

[43] I am aware that the plaintiff did not call Jojo to give evidence in this case. I will therefore put little weight to the statements taken from Jojo by Ernst & Young on its own. This does not mean that the said testimony is not admissible or should be subject to an adverse inference under s 114(g) of the Evidence Act 1950 as suggested by the defendants' counsel.

[44] The application of s 114(g) of the Evidence Act is not automatic. It must be shown that there has been any evidence of withholding or suppression of evidence and not merely on account of failure to call or to obtain evidence. I refer to *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] 1 CLJ 250.

[45] Furthermore, the Federal Court in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381, where Gopal Sri Ram FCJ held:

> [5] The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference. See *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33; [1991] 1 CLJ 9. See also, *Jaafar Shaari & Siti Jama Hashim v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509 where Peh Swee Chin FCJ said: 'The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it. 'There are two other authorities that are of assistance on the point. In *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, Brooke LJ when delivering the judgment of the Court of Appeal quoted from a *number of authorities including the following passage from the speech of Lord Diplock in Herrington v British Railways Board* [1972] AC 877:
>
> > The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.
>
> Brooke LJ then went on to say this:
>
> > From this line of authority I derive the following principles in the context of the present case:
> >
> > (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
> >
> > (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
> >
> > (3) There must, however, have been some evidence, however weak,

adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

The other case is *Crawford v Financial Institutions Services Ltd (Jamaica)* [2005] UKPC 40, where Lord Walker of Gestingthorpe when delivering the Advice of the Privy Council said:

> It is well settled that in civil proceedings the court may draw adverse inferences from a *defendant's decision not to give or call evidence* as *to matters within the knowledge of himself or his employees.*

[6] *Sarkar on Evidence* (16th Ed) at p 1837 states:

> It is the bounden duty of a party personally knowing the whole circumstances to give evidence and to submit to cross-examination. Non-appearance as a witness would be the strongest possible circumstance to discredit the truth of his case *Gurbakhsh v Gurdial, A* [1927] PC 230.

[46] In this case, the totality of the available evidence indicates that the second defendant wanted to maintain a curtain of secrecy and wanted to ensure that the application is processed and approved to appease the Prime Minister's request. The plaintiff's decision not to call Jojo does not mean that this court should invoke the adverse inference under s 114(g). There is sufficient independent evidence to enable this court to test the statements recorded by Ernst & Young and this statement is inconsistent with the statement recorded from the second defendant and from Nizam bin Sani. Nizam bin Sani did give evidence and I find that his testimony on this issue and as recorded by Ernst & Young to be credible and correct. Therefore, when read a whole, I find that the events mentioned by Nizam bin Sani and Jojo are correct. They were even confirmed in the testimonies recorded from the second defendant.

[47] I also do note that the defendants' counsel did lay substantial emphasis on the fact that Jojo remains in the employment of the plaintiff and should have been called to give evidence. However, I do not find any evidence of any suppression of Jojo's evidence by the plaintiff and that the defendants could have also subpoenaed the said witness if they wished to do so. This remains a civil claim and the burden of proof is based on the balance of probabilities. I find that the plaintiff has discharged their evidential and legal burden to support their claims against the defendants despite not calling Jojo.

[48] The other reason why I find it glaring that the second defendant had failed to exercise his mind appropriately when dealing with the sponsorship application is shown by the speed and nature by which the said application was processed, and the contents of the said application prepared by Nizam bin Sani. The timeline is shown in paras 15–25 earlier.

[49] I note that the first and second defendants' counsel blames the failure to undertake a proper due diligence and investigation as to the said application on Nizam bin Sani and the officers within the PR department of the plaintiff. Substantial criticisms were put to Nizam bin Sani as to how the latter had allegedly not undertaken detailed investigation as to how the said proposal would be beneficial to the plaintiff and whether the third defendant is a genuine company at the time when the said proposal was put for the second defendant's consideration.

[50] I accept that Nizam bin Sani and the PR Department should have undertaken a full investigation and had failed to undertake an appropriate test of the application filed by the third defendant. However, when looked as a whole, this is in line with the suggestions made by the second defendant and first defendant themselves. Both of them indicated that this must be done quietly and that this was required by the Prime Minister himself. The instructions to Nizam came from the second defendant's own personal assistant and was confirmed in the interview undertaken by Ernst & Young highlighted earlier. Nizam bin Sani and the PR Department cannot be blamed for following the instructions of the second defendant.

[51] Even if I am wrong on the above, the shoulder that bears the responsibility to scrutinise the application is not Nizam bin Sani or the PR Department. These employees are to assist the second defendant in the task, but the task lies solely with the second defendant. It remains the second defendant's duty and power to assess each application and to ensure that each application is justified and is in the best interests of the plaintiff.

[52] In this case, when one reads the memorandum prepared by Nizam bin Sani it is essentially a carbon copy of the proposal prepared by the third defendant. The justification for the said proposal is similar to those prepared by the third defendant. There is no evidence that the second defendant had scrutinised and inquired as to alleged shoddy work undertaken by Nizam. There is also no evidence of any meeting between Nizam bin Sani and the second defendant, or any person directed by the second defendant, to ascertain the basis for the said sponsorship. This surely would have been expected when dealing with a sponsorship involving the sum of RM15m. I find that the preponderance of evidence shows that the second defendant did not even address his mind as to whether the said proposal was for the benefit of the

plaintiff. He had simply approved it as he was told by the first defendant that this was at the request of the Prime Minister.

[53] Simply put I find that the second defendant merely acted as a rubber stamp and wanted to appease the request made by the Prime Minister. He had failed to exercise his powers appropriately and failed to exercise any diligence expected of him when dealing with the said sponsorship.

[54] I accept submissions by the aforesaid defendants' counsel that the process and that the power to approve the said payments lie with the second defendant. That was provided within the internal guidelines of the plaintiff. This fact was the core of the defendants' counsel submissions and in the forefront of the defence against the claim put to the first and second defendants'.

[55] However, I am of the opinion that merely because that the power to approve was within the discretion of the second defendant does not absolve the defendants for failure to act in the best interest of the plaintiff to exercise the said discretion appropriately and diligently. I find that the second defendant did fail to exercise the said discretion appropriately and had failed to put his mind to the issue of whether the sponsorship of the book would benefit the plaintiff.

[56] I find that the second defendant failed to address and consider the issue of the: (i) benefit of the sponsorship; (ii) the amount of monies involved; (iii) the fact that the payment will be made even before the book was published; (iv) the identity of the parties that actually own copyright to the book and the publication; and (v) the commercial needs of the plaintiff before agreeing to the said sponsorship. The plaintiff has proven that the second defendant failed to act a reasonable and competent managing director of the financial institution and had acted merely to please third parties.

The first and second defendants' failure to act in the best interests of the plaintiff

[57] As highlighted earlier, the first and second defendants are required to act in the best interest of the plaintiff. They must ignore externalities and third parties requests or needs unless they are in line with the best interests of the plaintiff.

[58] I find that the defendants justification as highlighted earlier and that the allege book will attract depositors as suggested by the first defendant is unsubstantiated and not reasonable.

[59] I also find that there is no evidence before me to show that there is any investigation or any due diligence that the sponsorship of the book to the sum of RM15m will assist the bank to pursue any of its obligations or purpose as suggested by the first and second defendants. The said defendants tried to allay the blame for these failures on Nizam or Jojo during trial. However, I find as the managing director and chairman of the plaintiff, it is incumbent, especially on the managing director, to have clear a supervision and active participation in the approval process. His conduct shows to me that he did not put his mind to the proposal and merely acted as a rubber stamp to appease the chairman or the then Prime Minister.

[60] The same applies to the first defendant. As chairman of the board of directors, he should have ensured that the issue of the said sponsorship be brought to the attention of the board for their consideration. This was not done. Instead, as shown through the Ernst & Young reports, as endorsed and agreed to by the said first and second defendants, they wanted to keep the issue of the sponsorship secret to ensure. This should not have been undertaken especially when the evidence shows that the previous sponsorships had been brought to the attention of the board of directors and these were for far smaller amount.

[61] The defendants are aware that this internal process and the board of directors should be made aware of the proposal and should have asked the board to either endorse it or reject it. This would have been the prudent act of a reasonably competent chairman or even a prudent managing director of the plaintiff.

[62] I also find that both defendants had failed to address their mind as to whether the said sponsorships is in the best interest of the plaintiff. A reasonably competent director would not have acted in the way undertaken by the said defendants. I find that the two defendants should have considered the evidence before them at that time before any making any decision.

[63] They should have considered diligently whether there is any basis to justify the said sponsorship. Instead, they did not do so and their actions in approving the said application in secret and without the board's knowledge shows that they were motivated by externalities. I find that the justifications put forward by the defendants are mere conjectures and are afterthoughts to justify their wrongful conduct.

[64] Looking at the facts and evidence objectively, I find that an honest and intelligent director would not have believed that the said sponsorship was for the benefit of the plaintiff. A reasonable and diligent director would have ensured that the sponsorship application be investigated further or at the very

least bring the said issue up for consideration at the next board of directors meeting to be deliberated in detail before any decision is made. This would have been the most prudent step to be taken in view of the sensitivity of the sponsorship as it involved the Prime Minister himself and the amount of RM15m, a substantial sum of money for any financial institution.

[65] Furthermore, I have also considered the previous conduct of the second defendant when dealing with other form of sponsorship or marketing proposals that has been suggested by third parties or even internally. As an example, the sponsorship of the programme undertaken by FAM and the Subang Skypark all were brought to the attention of the board of directors of the plaintiff. Approvals in these two cases contained detailed discussions as to the benefits of the said programmes and the second defendant decided to bring these expenses to the attention of the board of directors.

[66] To be clear, I am aware and note that the first and second defendants maintains that the book sponsorship was brought to the attention of the board, and both rely on the minutes of the board of directors meeting dated 26 April 2016 where it states:

> 9.0 Management Report
>
> 9.1 Management Report for March 2016
>
> 9.1.1 Dato MD briefed the Meeting on the key financial report as follows
>
> Profit
>
> Profit before Tax and Zakat for the month of Marh 2016 was RM143 million, declined by RM29.29 million or 18.28 % from previous month. The decline was due to:
>
> Higher costs of fund, increased by RM12.35 million (4.82%) due to higher no of days in March, and
>
> Higher operating expenditure by RM26.78 million or 31.46% mainly due higher marketing expenses and special contribution totalling to RM20 million but been offset with higher financing income and treasury income ...

[67] When I consider the testimonies of the first and second defendants and their previous statements made to Ernst & Young, I find that the argument of the said defendants is incorrect, and that the sponsorship was never brought to the attention of the plaintiff's board of directors. I therefore reject the said assertions and find that the board was not appraised of the book sponsorship. This was part of the plan to hide the said sponsorship and maintain secrecy as directed by the first defendant.

[68] I refer to the following excerpts from the records kept by Ernst & Young. These records were approved by those who were interviewed including the first and second defendants:

(a) the second defendant:

> The Board is not aware of this sponsorship.
>
> It depends as it is within my authority to approve the sponsorship.
>
> Maybe I will inform the Board but Tan Sri Chairman has mentioned that he does not want me to inform the Board. Tan Sri Chairman mentioned to me to do it discretely, don't inform anyone and explained that PM got so many problems.
>
> It would be tabled to the Board for approval as I don't think I will approve the sponsorship if it is not because of Tan Sri Chairman's instructions.

(b) the first defendant:

> No. I wanted to brief the Board but only after the book has been launched.
>
> It was not tabled to the Board earlier because Datuk MD stated that the process is following the governance and for that he did not advise me to bring the matter to the Board. He informed me that the approval of the sponsorship was within his limit and following the governance procedures.
>
> I am the Chairman of the Board. Normally, I don't comment but listen to other director's comments.
>
> ...
>
> For all sponsorships, it needs to go through the Board. There were a few other sponsorships that were tabled to the Board like the Football sponsorship and the Stesen Bank Rakyat Bangsar Sponsorship.
>
> ...
>
> However, for this particular case, Datuk MD did not present the sponsorship request to the Board as he mentioned that it is within his limit.

[69] My finding is further buttressed by the evidence of Liza Rosli bt Damsi, the former company secretary of the plaintiff, who confirmed that at the material time, the issue of the book sponsorship was not raised at any board meeting. She even explained that generally sponsorships of any events by the plaintiff will be raised at the board of directors meeting and sometimes additional requirements will be imposed by the board as seen in the Subang Terminal sponsorship programme. However, this was not done in this case. The board was only informed of the increased expenditure by the plaintiff without details being given. This is contrary to the duties owed to the plaintiff especially those mentioned specifically in the Board Charter referred to earlier.

[70] The failure to inform the board indicates that the first and second defendants had failed to discharge their duties owed to the plaintiff as I have addressed earlier. The first defendant, as chairman, should have at least ensured that the sponsorship proposal or even approval by the second defendant be raised before the board of directors. The second defendant should have ensured that this sponsorship be ratified by the board as it involved substantial sums of monies and involved sensitive personalities. The issue as to whether this is even beneficial to the plaintiff should have been deliberated openly and are reasoned out with the contributions of members of the board of directors.

[71] I also find that the decision by the second defendant to approve the said proposal blindly without adequate and reasonable basis is also shown by the fact that the sums involved substantial sums of monies and was not budgeted by the bank. The evidence before me shows that the budget for 2016 had provided for advertising for the sum of RM24,013,940, special contribution to the sum of RM7m and donation/sponsorship to the sum of RM8,232,570. These sums were budgeted and approved by the board of directors with detailed particulars provided for their consideration for each of these expenses. The additional sponsorship of RM15m would have far exceeded the allocated budget for that year and would have caused discrepancies to the allocated expenditure planned and approved by the board of directors.

[72] Furthermore, when the said proposal was submitted, the third defendant was not even incorporated. No proper investigation was undertaken as to who owns the intellectual property rights to the book and whether the costs of publication and distribution to schools were correct or reasonable.

[73] I find it unreasonable for a managing director of a financial institution to blindly agree to a proposal to sponsor for the sum of RM15m that is based on a scantily prepared memorandum that itself was copied from the proposal submitted by the third and fifth defendants. The second defendant, I find, had closed his eyes to the obvious to appease the then Prime Minister and the first defendant.

[74] Therefore, I believe a reasonable, honest, and diligent chairman or managing director would have ensured that such expenses be presented to the board of directors even before it is approved. I agree that the said expenditure falls within his powers, but in view of the circumstances, a reasonable, honest, and diligent director would not have agreed to approve it without informing the board of directors first.

[75] I also find that the defendants did breach their contractual duties and statutory duties as stated in paras 32 and 33 earlier. The defendants as directors

must act in the best interest of the company and ensure that the board is appraised and given all adequate information to perform their function.

[76] These duties are enshrined in the Board Charter and the above referred act, which are also incorporated into their contracts. I do not accept the excuses provided by the said defendants and find that these are mere afterthoughts.

[77] By their failure to exercise independent judgment when approving the said sponsorship, failure to deliberate and exercise appropriate judgment, failure to bring the sponsorship to the attention of the board.

[78] Their decision to keep the sponsorship in secret and for failure to take steps to ensure that the sponsorship is in the best interest of the plaintiff are clear breaches of their contractual and statutory duties to the plaintiff.

[79] The fact that the defendants wanted to keep the sponsorship a secret is a clear sign that they were aware of the wrong that they were undertaking. I also cannot accept that the defendants, being a seasoned accountant (second defendant) and a seasoned former senior armed forces officer (first defendant), not to have seen the signs before them that there was something amiss with the said sponsorship proposal.

[80] In this case, the monies were to be paid even before the books were to be published and distributed to the schools. The sums of monies were to be paid to the fourth defendant, a firm of solicitors who were not on the plaintiff's panel and with whom they were not familiar with. The benefit of the said sponsorship was also not fully deliberated and was carbon copied from the third defendant's proposal. The defendants, especially the second defendant, should have paused and considered whether the said proposal is beneficial and whether it is bona fide. Instead of doing this, he went ahead and directed it be undertaken in secret, in accordance with the instructions of the first defendant. This to me shows that the first and second defendants were aware that the sponsorship of the book was wrong but chose to close their eyes with the hope of appeasing third parties.

[81] Based on the above I find that the first and second defendants had failed to act in the best interests of the plaintiff and did breach their fiduciary, contractual and duty of care to the plaintiff. I find that:

(a) the decision to approve the sponsorship of the book by the second defendant is not objectively in the best interests of the plaintiff;

(b) the second defendant had failed to address his mind as to whether the said sponsorship was in the best interests of the plaintiff and had considered irrelevant consideration such as the request of the Prime Minister;

(c) both defendants wanted to hide or keep the said sponsorship from the eyes of the other members of the board of directors;

(d) both defendants failed to ensure that the sponsorship is brought to the attention of the board of directors; and

(e) both defendants failed to ensure that the safe and systematic corporate governance system within the plaintiff is adhered to as required by Bank Negara Malaysia and by internal guidelines of the plaintiff.

[82] Although the decision to approve the said sponsorship lies with the second defendant, however this saga started from the chairman himself, the first defendant. He had wanted this sponsorship to be hushed up and kept confidentially to protect the Prime Minister. He had indicated to the second defendant that this proposal came from the PMO. As chairman he should not have interfered, and he should have left it to the second defendant to undertake based on the internal policies of the plaintiff. He should have also brought this proposal directly to the board of directors. Despite knowing its existence and the glaring substantial expenses, he kept quiet and that to me is evidence of breach of the first defendant's duties to the plaintiff.

[83] I also note the defence raised by learned counsel for the defence, that as the Prime Minister is involved and that the Minister in charge of the plaintiff under the above referred Act of Parliament, therefore, the said decision by the defendants to approve the sponsorship is reasonable. Learned counsel also argues that the decision to approve the same will ensure that the Government of the day is stabilised and that this will be for the greater benefit of the plaintiff.

[84] I do not find much credence with the arguments put forward by learned counsel for the first and second defendants.

[85] My reading of the Board of Directors' Charter and the Code of Conduct as provided in s 5A of the DFIA indicates that that the obligation of any members of the board of directors of the plaintiff shall lie first and foremost to act solely in the best interests of the plaintiff. It is not to ensure that any personal requests or demands of any third party, even if the said person is the Prime Minister or the Minister of Finance, are adhered to. Neither should any of the Directors disregard the interests of the plaintiff to ensure the political stability of any person or any Government as suggested by learned counsel of the defendants.

[86] I agree that the plaintiff and members of its board of directors may be answerable to the Minister of Finance as suggested by learned counsel by the defendants. However, this does not mean that the defendants must act in accordance with the will of the said Minister alone or act in accordance with his request.

[87] When they were faced with the request to sponsor a book concerning the Prime Minister's own father and his legacy,the defendants should have been circumspect and consider what is the real commercial benefit to the plaintiff. They should have looked at the facts objectively and addressed their mind as reasonable, honest, and competent directors of a financial institution before making any for suggestion or decision. At the very least bring this issue to the board with full disclosure of all facts for the issue to be deliberated. This was not done and they chose to undertake the said sponsorship under a cloak of secrecy.

[88] A prudent, reasonable, honest, and competent director would have referred the issue to the board of directors to deliberate with all relevant facts presented. I find the said defendants actions falls short of the standard expected of them and they did breach their contractual and statutory duties to the plaintiff.

Allegation of conspiracy to defraud against the defendants

[89] On the allegation of conspiracy to commit fraud against all defendants, I find that they were dishonest when dealing the said sponsorship programme.

[90] The applicable law on this area has been extensively explained in *Maheswari a/p Eliathamby & Anor v Koperasi Serbaguna Kebangsaan Bhd & Ors* [2019] 1 MLJ 440, *Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal* [2016] 3 MLJ 797 and *Tekital Sdn Bhd v Sarina bt Kamaludin & Ors* [2012] 8 MLJ 734. I will not reiterate the same herein save for the following summary stated by the Court of Appeal in *Cubic Electronic*:

> [10] To appreciate the submissions advanced by learned counsel for the defendants, we think it is relevant to deal with the law of conspiracy which is part of what are known as the 'economic torts'. There are four elements to a conspiracy claim:
>
> (a) a combination or agreement between two or more individuals;
>
> (b) an intent to injure;
>
> (c) pursuant to which combination or agreement, and with that intention, certain acts were carried out; and
>
> (d) resulting loss and damage to the claimant.
>
> (See *Khoo Teng Chye v Cekal Berjasa Sdn Bhd & Anor* [2015] 6 CLJ 449 (CA).)

[11] There are two kinds of conspiracy, the elements of which are distinct:

(a) unlawful means conspiracy: a conspiracy in which the participants combine to perform acts which are themselves unlawful (under either criminal or civil law); and

(b) lawful means conspiracy: a combination to perform acts which, although not themselves per se unlawful, are done with the sole predominant purpose of injuring the claimant — it is in the fact of the conspiracy that the unlawfulness resides (see *Milicent Rosalind Danker and Anor v Malaysia-Europe Forum Bhd & Ors* [2012] 2 CLJ 1076 (HC); *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393 (CA)).

[12] The distinction between the two was succinctly elucidated by Lord Bridge in *Lonrho plc v Fayed* [1991] 3 All ER 303 as follows:

> Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.

[13] The elements required to bring an action for unlawful means conspiracy and lawful means conspiracy are as follows:

> A combination or agreement between two or more individuals
>
> It is not necessary to show that there was anything in the nature of an express agreement, whether formal or informal. The court looks at the overt acts of the conspiracy and infers from those acts that there was agreement to further the common object of the combination. It is sufficient that two or more persons combine with the necessary intention or that they deliberately co-operate, albeit tacitly, to achieve a common end (*R Siracusa* [1990] Cr App R 340). Neither is it necessary that all those involved should have joined the conspiracy at the same time; but all those said to be parties to the conspiracy should be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they are acting in concert. The question in relation to any particular scheme or enterprise in which only one or some of the alleged conspirators can be shown to have directly participated is whether that enterprise fell within the overall scope of their common design (*R v Simmonds* [1969] 1 QB 691).
>
> It is possible for a conspirator to join later. However, a person is only liable for the damage that is suffered from the time that they join the conspiracy; they are not liable retrospectively for the damage that has been suffered prior to their joining (*O'Keefe v Walsh* [1903] 2 IR 681).

[91] I find that the evidence before me proves only that the third, fourth, and fifth defendants were party to a conspiracy and their actions were intended to cause harm to the plaintiff. These third, fourth and fifth defendants were party to a scheme to cause the plaintiff to agree to the sponsorship of the book that was never launched.

[92] There is no evidence before me that the book was printed or even purchased from the original publisher or even ordered from the said entity save for the unstamped agreement dated 28 March 2016. One would have expected that there would have at least been evidence of purchase orders, printing charges and delivery charges for these books that costs the plaintiff RM15m. No evidence was ever produced by the third and fifth defendants to show that they had in fact utilised the said funds for the purpose as represented to the plaintiff.

[93] I am aware that the third and fifth defendants allege that the books had been seized by the MACC during a raid by the said enforcement entity. However, I find the said allegation not substantiated by any credible evidence. One would have expected at least a notice would have been issued by MACC and appropriate seizure of documents list would have been produced by the defendants to prove these allegations.

[94] I have also considered the picture of the alleged store that kept copies of these books. I do not find this picture credible and put no weight to it. I find that the said picture does not show that the books had been printed as suggested by the defendants.

[95] Regarding the fourth defendant, I note that she did not act as a stakeholder for the plaintiff. However, her letter to the plaintiff dated 3 March 2016 did indicate that she was to act as a stakeholder for the project. This would have mean that she must have ensured that the monies would have been spent for the publication of the books and for the distribution of the books. This would have been in line with cl 3.4 of the agreement between Rasyaqierra Publications & Distributors with the third defendant.

[96] The said clause did indicate that the said firm, the fourth defendant, will only release the funds once 24,000 of the books were printed and distributed. No evidence was produced by the said firm to show that 24,000 books were printed and distributed and that the said funds were utilised in accordance with the terms of the aforesaid agreement. I also note that the despite the waiver by the third defendant to the disclosure of the client's account, no statement of account was shown by the fourth defendant. This would have assisted the fourth defendant in her defence and shown whether she had acted honestly when dealing with the funds placed with her as a stakeholder for the project.

[97] I refer to the decision of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan Kok Ming Philip* [1995] 3 MLJ 74; [1996] 2 CLJ 380 where Lord Nicholls stated: A

> Before considering this issue further it will be helpful to define the terms being used by looking more closely at what dishonesty means in this context.
>
> Whatever may be the position in some criminal or other contexts (see, for instance, *R v Ghosh* [1982] QB 1053; [1982] 2 All ER 689; [1982] 3 WLR 110), in the context of the accessory liability principle, acting dishonestly or with a *lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances.* B
>
> This is an objective standard. C
>
> At first sight this may seem surprising.
>
> Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence.
>
> Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. D
>
> Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct.
>
> Carelessness is not dishonesty. E
>
> Thus, for the most part dishonesty is to be equated with conscious impropriety.
>
> However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances.
>
> The standard of what constitutes honest conduct is not subjective. F
>
> Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual.
>
> If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour. G
>
> In most situations, there is little difficulty in identifying how an honest person would behave.
>
> Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property.
>
> Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. H
>
> Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, then proceed regardless. I

[98] In the circumstances, I find that the plaintiff has proven its claim for conspiracy to defraud against the third, fourth, and fifth defendants. Their conduct when considered does not reflect the actions of an honest person. The

fourth defendant at the very least must have closed her eyes and ears to the obviously wrong conduct of defrauding the plaintiff. She would have known what happened to the monies but refused to show to this court where the said funds were paid to despite the waiver of privilege by the third defendant. I apply the test laid above and summarised in *Tiga Gajah Cho Heng Sdn Bhd v Majuperak Tepung Beras Sdn Bhd* [1997] 4 MLJ 504 and *Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor* [2013] 7 MLJ 437.

[99] Regarding the claim of conspiracy against the first and second defendants, I do not find that they were party to the conspiracy. As I have found earlier, they were negligent and had breached their duties to the plaintiff, but their action falls short of fraudulent conduct. I do not find that the claim of conspiracy to defraud is proven against the first and second defendants.

[100] Due to the said conduct by the third to fifth defendants, I find that this is suitable case for this court to exercise its powers to impose exemplary and aggravated damages against them. Each of the said defendants are liable to the said defendants jointly and/or severally for exemplary damages to the sum of RM1m. I refer to the decision of the Court of Appeal in *Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors* [2019] 1 MLJ 421 and *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784. I find that their conduct was calculated to defraud the plaintiff and all of them knew or at the very least, on the part of the fourth defendant, closed an eye to the wrongdoing that was apparent before her.

Unjust enrichment against the third to fifth defendants

[101] I also find that the third and fifth defendants have been unjustly enriched to the detriment of the plaintiff. I do not find liability against the fourth defendant as she was only acting as the stakeholder for the third defendant and for the project. There is no evidence that the funds had flowed to her personal account, or she received any benefit from payments of the said funds.

[102] As I have said earlier, I do not find any credible evidence that the books were printed and distributed. There is no evidence that the monies were utilised for the purpose as represented by the third and fifth defendants. The sum paid by the plaintiff should only be used for the purpose of publication and distribution of the book. Therefore, the third and fifth defendants should be made liable and should be directed to return the said funds paid by the plaintiff.

Liability for the penalty imposed by Bank Negara Malaysia

[103] Regarding the penalty imposed by Bank Negara Malaysia under s 41(4)(c) of the DFIA 2002, I find that this sum cannot be claimed against the defendants.

[104] The penalty imposed by Bank Negara Malaysia is caused by the failure of the Bank to have a sound risk management and governance procedures. The penalty did not arise solely because the book sponsorship programme but is targeted towards the failure of the plaintiff to have the expected internal governance procedures. This does not relate solely to the book sponsorship. The book sponsorship is merely a fruit of the underlying problem that is penalised by the Central Bank.

[105] Therefore, I reject the said claim by the plaintiff against the defendants.

ORDERS OF THIS COURT

[106] For the aforesaid reasons, I make the following orders against the defendants:

(a) the defendants are liable to the plaintiff jointly and/or severally to the plaintiff for the sum of RM14,991,283.20. This sum shall be paid to the plaintiff within 14 days from the date of the order of this court;

(b) exemplary and aggravated damages against the third, fourth, and fifth defendants to the sum of RM1m to the plaintiff jointly and severally;

(c) costs of RM20,000 to be paid by each defendants to the plaintiff subject to allocator; and

(d) interest on judgment debt at 5%pa from date of judgment to date of realisation.

Order accordingly.

Reported by Dzulqarnain Ab Fatar